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## Supervisory governance The case of the *Dutch Consumer Authority*

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*The scope of the proposed regulation is limited to cross-border infringements. Therefore the Member States are not required to change their arrangements for domestic infringements by this regulation.*<sup>2</sup>

### 1. Introduction

This contribution concerns the multilevel and multi-actor governance of supervision. It focuses on the establishment, in the Netherlands, of a new *Consumer Authority*. This public Authority is particularly interesting as it is equipped to fit in with existing civil law and self-regulatory mechanisms to uphold consumer protection, while at the same time it has administrative law instruments that have been newly added to the tool-box of consumer protection law. Furthermore, the *Consumer Authority* is to act as a partner in the European network of national consumer authorities, whereas, on the other hand, nationally it needs to coordinate its efforts with other public supervisory agencies and with private consumers' organisations.

The leading question in this contribution is how this new supervisory governance-structure, that is largely a response to the EC Regulation on consumer protection cooperation (in short *Rcpc*),<sup>3</sup> is to operate, especially with regard to: (a) the concurrence of and coordination between (self-regulatory) civil law safeguards and (command & control) administrative law instruments, and (b) the locus or loci of responsibility for supervision.

First, we will address the relevant regulatory framework; starting with some remarks on the previously mentioned *Rcpc*, followed by some comparative notes and concluding with an overview of the Dutch draft Act on the Enforcement of Consumer Protection (*AECPP*).<sup>4</sup> Then we will attempt to characterise the *Dutch Consumer Authority* in terms of its supervisory and enforcement tasks. Subsequently, the leading question will be subject to further scrutiny, with the two aspects as mentioned above (a. and b.). Finally, an attempt will be made to draw some conclusions, which may add to our understanding of the governance of supervision, especially with regard to the multi-actor and multilevel aspects.

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2 Explanatory Memorandum to Regulation (EC) no. 2006/2004 (see below), 18.7.2003, COM(2003) 443 final (hereinafter referred to as E.M.(*Rcpc*)), p. 8 under no. 35.

3 Regulation (EC) no. 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), *OJ* 2004 L 364/1, 9.12.2004 (hereinafter referred to as *Rcpc*).

4 *Kamerstukken II* 2005-2006, 30 411, nos. 1-3.

## 2. The legal framework

### 2.1. The *Rcpc* (EC Regulation on consumer protection cooperation)

The main objective of the *Rcpc*, which is also relevant in an EEA context, is the cooperation between national authorities and between national authorities and the European Commission.<sup>5</sup> The key to cooperation is the concept of *mutual assistance*.<sup>6</sup> In the wording of the Explanatory Memorandum to the *Rcpc*, ‘The proposal provides a framework of mutual assistance rights and obligations for enforcement authorities to use when dealing with cross-border infringements. The resulting *network* is designed to give national enforcement authorities an enforcement solution to deal quickly with the most serious rogue traders.’<sup>7</sup>

#### *Mutual assistance*

There are two types of assistance; a request from a foreign consumer authority for an exchange of information (Art. 6 *Rcpc*) and a request from a foreign consumer authority to take enforcement measures (Art. 8 *Rcpc*). Both requests are sent by the applicant authority via its own single liaisons office to the single liaisons office of the requested authority, which forwards the request to the requested authority.<sup>8</sup> The requested authority ‘shall supply’ (without delay) any relevant information, respectively ‘shall take all necessary enforcement measures’ (for the cessation or prohibition of an infringement). However, discretion concerning the effectiveness, efficiency and proportionality of the requested response, in the case of sanctions, remains with the requested consumer authority.<sup>9</sup> The requested consumer authority can ask other public offices to assist in responding properly to the applicant’s request,<sup>10</sup> but it can also seek assistance from ‘bodies with legitimate interest’.<sup>11</sup>

#### *Substantive law & competences*

Cooperation between national authorities is within the scope of EC laws, regulations and directives which protect consumers’ interests. On the basis of Article 3, under a *Rcpc*, this scope is limited to those *transposed* directives and regulations listed in the Annex.

With regard to the relevant directives it is only the transposition thereof into national law which requires supervision and enforcement under the *Rcpc*. This implies that national authorities must sometimes execute foreign law. Sharing knowledge about the domestic law of 28 countries and understanding the pertinent differences is therefore of great importance. This is where the network can play an important role.<sup>12</sup>

This is also where one needs to realise that the applicability of both procedural and substantive national law will require recourse to (private) international law, as the *Rcpc* does not offer guidelines for determining, in specific cases of infringement, in which country and according to

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5 Art. 1 *Rcpc*, *supra* note 3. For a broader policy perspective on the renewal of European consumer policy, see the documentation under [http://ec.europa.eu/comm/consumers/overview/cons\\_policy/index\\_en.htm](http://ec.europa.eu/comm/consumers/overview/cons_policy/index_en.htm). For the Green Paper on European Union Consumer Protection, 2.10.2001, COM(2001) 531 final (laying the foundations for the *Rcpc*) see [http://europa.eu.int/eur-lex/en/com/gpr/2001/com2001\\_0531en01.pdf](http://europa.eu.int/eur-lex/en/com/gpr/2001/com2001_0531en01.pdf). See also pp. 2 and 3 (nos. 4-7) of the Explanatory Memorandum to the *Rcpc*, *supra* note 2. For a general comment see the opinion of the European Consumer Law Group; ECLG/021/04 – April 2004, <http://212.3.246.142/1/AEHJHKEDKNLHMBMBOCFJOFBPD BK9DWYPY9DW3571KM/BEUC/docs/DLS/2004-01121-01-E.pdf>

6 First mentioned in Art. 2, Para. 1 *Rcpc*, and elaborated in Chapters II and III of the *Rcpc*, *supra* note 3.

7 E.M.(*Rcpc*), *supra* note 2, p. 2.

8 Art. 12, Para. 2 *Rcpc*, *supra* note 3; in the Netherlands the *Consumer Authority*.

9 Art. 8, Para. 2 *Rcpc*, *supra* note 3. Note that Art. 15, Para. 2 *Rcpc* lists the circumstances under which a request for enforcement measures may be denied.

10 Art. 6, Para. 2 and Art. 8, Para. 2 *Rcpc*, *supra* note 3.

11 Art. 8, Para. 3 *Rcpc*, *supra* note 3.

12 See also the (Dutch) Explanatory Memorandum to the *AECP*, *supra* note 4, p. 8 (hereinafter referred to as E.M.(*AECP*)).

which substantive law enforcement should take place.<sup>13</sup> The relevance of this becomes clear if we look at Article 3, sub. b *Rcpc*. This article describes an intra-Community breach as any act or omission contrary to the laws that protect consumers' interests, as defined in the regulations and transposed directives referred to in Article 3, under a *Rcpc*, 'that harms, or is likely to harm, the collective interests of consumers residing in a Member State or Member States other than the Member State where the act or omission originated or took place; or where the responsible seller or supplier is established; or where evidence or assets pertaining to the act or omission are to be found.' In other words, the place of origin, of establishment and/or of relevant evidence or assets may be a reason for the consumer authority to undertake action and it may do so in different national legal contexts concerning supervisory activities and enforcement measures.

The *Rcpc* expands on Directive 98/27/EC on injunctions for the protection of consumers' interests. This directive also concerns the possibility for transboundary class actions as implemented in the Netherlands in Article 305c CLC. In as far as this directive enables foreign public authorities to request an injunction in a foreign court (Art. 3 sub. a), the *Rcpc* now offers the possibility for a foreign authority to seek assistance from the domestic authority in taking enforcement action (whether or not through a court injunction).<sup>14</sup>

### Entities

Finally, for the moment, it needs to be noted that the *Rcpc* distinguishes the following four types of national entities (see also Section 2.1 under *Supervisory framework*):<sup>15</sup>

1. The 'competent authority' (Art. 3, sub. c) – being any public authority within a Member State having responsibility to enforce 'the laws that protect consumers' interests'. In the Netherlands, the main competent authority is the newly created *Consumer Authority*, but, as will be shown below (in Section 2.3), some competences rest with other, already existing, public supervisory authorities.
2. The 'single liaison office' (Art. 3, sub. d in conjunction with Art. 4, par. 1) – this stands for the public authority in each Member State which is uniquely designated as being responsible for coordinating the application of the *Rcpc* within that Member State. In the Netherlands this authority rests (exclusively) with the *Consumer Authority*.<sup>16</sup>
3. Possible 'other public authorities' (Art. 4, Para. 2) – refers to the fact that other public offices, apart from the ones under 2 and 3, may be involved in supervisory and enforcement activities as addressed in the *Rcpc*, not on the basis of competences derived from the *Rcpc*, but on the basis of their already nationally attributed competences.
4. 'Bodies having a legitimate interest in the cessation or prohibition of intra-Community infringements' (Art. 4, Para. 2) – points to a similar involvement, but in this case by an entity outside 'public office'. The competent authority (as described under 1.) may, upon a request for assistance from an authority of another Member State, instruct a designated civil law body, 'to take all necessary enforcement measures available to it under national law to bring about the cessation or prohibition of the intra-Community infringement on behalf of the requested authority'.<sup>17</sup>

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, p. 10.

<sup>15</sup> Provisions with regard to the communications between national authorities and between these authorities, Member States and the Commission will be further discussed below (Section 4.2).

<sup>16</sup> Art. 2.3, Para. 1 *AECP*, *supra* note 4..

<sup>17</sup> See Art. 8, Para. 3 *Rcpc*, *supra* note 3. This instruction is not a transferral of competences – see ECLG, *supra* note 5, pp. 3-4.

## 2.2. *Some comparative notes*

The Explanatory Memorandum to the *Rcpc* acknowledges that the introduction of the *Rcpc* will require some changes to the enforcement rules in Member States. It states that ‘Clearly (...) some Member States will be more affected than others will. A large majority of Member States and acceding countries nevertheless have public authorities with specific consumer protection enforcement responsibilities. (...) However no such authorities exist in Germany, the Netherlands or in Luxembourg. In Austria, Länder authorities have executive authority to impose fines on traders for breaches of certain laws.’<sup>18</sup>

No further reference to national differences in supervision and enforcement, *inter alia*, as to the choice or coordination between civil law and administrative law enforcement, is made in the Memorandum.<sup>19</sup> The Explanatory Memorandum to the *AECP* offers some consolation in offering a concise overview of some basic aspects of the legal regimes for consumer protection in 10 Member States.<sup>20</sup> A ‘brief encounter’ with this ‘state of affairs’ prior to the implementation of the *Rcpc* is relevant as it places the response by the Dutch government to the *Rcpc* (discussed under Section 2.3 and thereafter) within the context of different governance structures for the supervision of (European) consumer protection law.<sup>21</sup>

### *United Kingdom*

In the United Kingdom the independent *Office for Fair Trading* (OFT)<sup>22</sup> is responsible for supervising and enforcing consumer protection *and* competition laws. The OFT is not involved in settling individual complaints. In the UK the enforcement of consumer protection laws is a matter for the courts. The OFT itself is authorised to ask traders to agree to an undertaking to cease an infringement and to request a court for an enforcement order for the cessation or prohibition of an infringement.<sup>23</sup> Furthermore, the OFT manages the OFT Approved code logo as a benchmark for service quality, aimed at promoting customer confidence.

### *Denmark*

In Denmark the National Consumer Agency of Denmark (*Forbrugerstyrelsen*),<sup>24</sup> as part of the Ministry of Family and Consumer Affairs, consists of the Consumer Information Board, the Consumer Complaints Board (dealing with individual cases) and the Consumer Ombudsman (dealing mainly with enforcing the Marketing Practices Act). Its objectives are to offer a coordinated and active contribution in the field of consumer affairs through information and service activities and to contribute to the creation and maintenance of a high level of consumer protection. The Ombudsman office enforces certain acts, it can offer advice and can bring cases to both the civil and criminal courts; it does not hear individual complaints, but it can intervene in civil proceedings so as to assist the individual complainant.

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18 E.M.(*Rcpc*), *supra* note 2, p. 7.

19 The choice of a public consumer authority is addressed in E.M.(*Rcpc*), *supra* note 2, pp. 7-8, and will be further discussed below (in Section 4.1).

20 E.M.(*AECP*), *supra* note 4, p. 13-15.

21 Mainly from the Memorandum, but supplemented or updated by additional Internet research on the basis of the sites mentioned in footnotes 40-47.

22 <http://www.offt.gov.uk/default.htm>

23 Non-compliance with such an order is regarded as a ‘contempt of court’. The court may transform a request into an undertaking.

24 <http://www.forbrug.dk/english/>

### Sweden

In Sweden the Swedish Consumer Agency (*Konsumentverket*)<sup>25</sup> is a state agency of which the Director-General is also the Consumer Ombudsman. The Agency supervises a broad range of consumer protection laws. It does not handle individual complaints – this task is left to the National Board for Consumer Complaints. The Ombudsman can pursue legal action on behalf of consumer interests, such as a class action. The agency can also issue an administrative order subject to a penalty, but needs a court order to actually lay claim to the penalty.

### Belgium

In Belgium the general directorate on Control and Consultation,<sup>26</sup> as part of the Federal Office for Public Service Economy, SMEs, Self-employed and Energy, has the objective of protecting the rights of both consumers and traders. In the case of an infringement, public servants involved in supervision fall within the responsibility of the public prosecutor. In such a case the Federal minister can no longer issue administrative orders. All in all, the Belgian enforcement of consumer protection laws is a matter for civil and criminal law. The directorate may, in specific cases, withdraw licences, offer an amicable settlement and issue warnings. The criminal and civil courts can respectively (and simultaneously) impose penal sanctions or order the cessation of a prohibited activity or an infringement.

### France

In France the *Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes* (CCRF)<sup>27</sup> forms part of the Ministry of Economic Affairs, Finance and Industry (MINEFI). By and large, enforcement competences are similar to those in Belgium (except for being able to offer an amicable settlement).

### Italy

In Italy, the *Autorita Garante della Concorrenza e del Mercato*<sup>28</sup> is an independent agency which is involved in upholding competition law and the prohibition of misleading and comparative advertising. In the latter area the agency can only act in the collective defence of all consumers, but only on the basis of one or more individual complaint(s). It will then undertake an investigation and, if the complaint is found to be justified, it can issue an administrative cessation or a prohibition order. It may also order the advertiser to publish a statement rectifying the inaccurate advertisement. If the advertiser fails to comply with the instructions of the Authority, it is liable to an administrative fine. A ruling by the Authority that an advertisement is misleading never leads to the payment of damages to the complainant for any loss or damage suffered. This can only be obtained by means of a request before the courts.

### Ireland

In Ireland the *Office of Directors of Consumer Affairs* (ODCA)<sup>29</sup> is an independent agency responsible for giving advice and information to consumers and for enforcing several consumer protection laws. It does not handle individual complaints, but it can enforce compliance with

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25 <http://www.konsumentverket.se/mallar/en/startsidan.asp?lngCategoryId=646>

26 [http://mineco.fgov.be/PROTECTION\\_CONSUMER/complaints/complaints\\_nl\\_003.htm#Inleiding](http://mineco.fgov.be/PROTECTION_CONSUMER/complaints/complaints_nl_003.htm#Inleiding)

27 <http://www.finances.gouv.fr/DGCCRF/>

28 <http://www.agcm.it/eng/index.htm>

29 <http://www.odca.ie/>



consumer protection laws through the prosecution of offences and by seeking orders at the civil (High) court.

*Germany, Luxembourg, Austria and the Netherlands*

As was stated above, in Germany, Luxembourg, Austria and the Netherlands there were no national consumer authorities prior to the *Rcpc*.<sup>30</sup>

*Overview*

Even with this overview of just 11 Member States, there clearly seems to be quite some variety in Member States' consumer protection laws. The most relevant points for the purposes of this contribution are the following:

in a number of states a consumer agency (at least similar to and certainly suitable for adjustment to the requirements of the *Rcpc*) existed prior to the introduction of the *Rcpc* – in others, as noted in the *Rcpc*, such a public authority had to be introduced or specifically designated;

where consumer authorities do exist, sometimes they operate as an independent agency and sometimes under the political responsibility of a minister (*vis-à-vis* parliament). Numerically, the independent agencies are roughly balanced with the subordinate authorities;

in a number of cases the supervision and enforcement of consumer protection law is, organisationally speaking, combined with the supervision and enforcement of competition law (such as in the UK, France and Italy) – in the Explanatory Memorandum to the *Rcpc* the option of combining competences in both fields is propagated for those Member States that already have a public Competition Authority but lack a consumer authority as such.<sup>31</sup>

across the Member States substantive law ranges from civil and administrative law to criminal law. In most countries effective enforcement, in the case of obstruction by the offender, lies with the courts. Clearly most (existing) authorities distance themselves from individual complaints, and focus on collective infringements and on the possibility of (support for) class actions.

**2.3. The draft AECP (Act on Enforcement of Consumer Protection)**

*Grounds*

The introduction of the *Dutch Consumer Authority* is part of a re-evaluation of consumer protection in the Netherlands. In that sense the draft *AECP* is not just an implementation of the *Rcpc*, but also a response to the deficiencies within the existing legal framework for consumer protection. The Explanatory Memorandum to the aforementioned draft stipulates three grounds for this re-evaluation:<sup>32</sup>

- a strong market should be matched by a strong government;
- major gaps in the legal fabric of existing consumer protection;
- implementing the *Rcpc*.

Unfortunately, there is no further elucidation of the opinion that strong markets should be matched by strong governments, so we are left to assume that the Dutch government considers

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30 Note that in Germany in 2002 an independent *Management Authority for Health-Related Consumer Protection* was introduced. ([http://www.bvl.bund.de/EN/Home/homepage\\_\\_node.html](http://www.bvl.bund.de/EN/Home/homepage__node.html))

31 E.M.(*Rcpc*), *supra* note 2, under no. 36. As we will see, the Dutch government did not share this point of view.

32 E.M.(*AECP*), *supra* note 4, p. 2.

this ground to be self-evident. The argumentation that is given in relation to the second ground may, however, shed some light on this point.

The gaps or deficiencies in existing consumer protection law that the Dutch government considers most serious relate to consumer complaints of a *collective* nature. According to the Memorandum, research shows that in the Netherlands, during the years 2001-2003, approximately 10,000 complaints from individuals were lodged with private complaints organisations, concerning (mainly) collective breaches of consumer law – breaches involving an open group of consumers. The Dutch government feels that these numbers show that in the cases involved the individual protection of consumers' interests is insufficient. Furthermore, collective breaches require more attention as they disrupt the market and distort equal competition. All in all, it is felt that a public law response to these collective breaches of consumer protection will benefit the workings of the markets and thus contribute to economic growth.<sup>33</sup> This point also relates to the view, expressed elsewhere in the Memorandum – and relevant to the 'strong government *vis-à-vis* strong markets' issue – that public supervision should (and should only) intervene where the market fails to effectively solve conflicts concerning consumer interests through self-regulatory or civil law mechanisms for dispute settlement.<sup>34</sup> If the market fails to deal with collective infringements, the government should be sufficiently equipped, such as through a public supervisor, to act unilaterally and decisively.

The implementation of the *Rcpc* may not be the only objective of the draft *AECp* on the enforcement of consumer protection; it is, however, the primary motive for this new piece of legislation. Establishing a national *Consumer Authority* is the 'piece de resistance' of the draft and serves to implement the obligation under the *Rcpc* to appoint existing or to establish new national authorities which are to take part in a new European network for enforcing Community consumer law against transboundary collective breaches.<sup>35</sup>

The Dutch government has chosen the option of creating a new authority<sup>36</sup> because the already existing supervisory agencies focus on sectoral legislation, such as telecommunications<sup>37</sup> and financial services<sup>38</sup>, whereas consumer protection requires a more general supervisor. Furthermore, the existing public authorities fulfil a task that is a poor match for consumer protection, as is considered to be the case with the *Netherlands Competition Authority*.<sup>39</sup>

### *Supervisory framework*

The draft *AECp* offers a new supervisory framework for the enforcement of consumer protection law. The *Dutch Consumer Authority* has been designated as the main competent authority (Art. 3 under c and Art. 4, Para. 1) of the *Rcpc* and has been assigned with the task of enforcing (implemented) European consumer protection law, with the exception of responding to breaches related to financial services. Initially, this authority will be a division of the Ministry of Economic Affairs, operating under ministerial supervision and responsibility. Ultimately, four years

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33 *Ibid.*, pp. 2-3.

34 *Ibid.*, pp. 6 and 25.

35 E.M.(*AECp*), *supra* note 4, p. 3. Also EER.

36 Art. 4 *Rcpc*, *supra* note 3, leaves it to the Member States to decide whether to create a new entity or to assign the new tasks and competences to an existing entity.

37 The OPTA: the *Independent Post and Telecommunications Authority*.

38 The AFM: the *Netherlands Authority for the Financial Markets*.

39 The NMa: the *Netherlands Competition Authority*. This is in contrast to, *inter alia*, the British *Office of Fair Trading*, which combines supervision in both areas.

after the establishment of the Authority, an evaluation will be made, in order to decide whether the Authority should be converted into an independent agency.<sup>40</sup>

Five other, already existing Dutch supervisory agencies are also designated as competent authorities, with the obligation to execute competences from the *Rcpc*, in as far as they are explicitly assigned to them in the draft *AECP*. These agencies are: the *Netherlands Authority for the Financial Markets*, the *Netherlands Health Care Inspectorate*, the *Dutch Media Authority* and the *Food and Consumer Product Safety Authority*. Whenever one of these (other) authorities is competent to enforce the pertinent regulations, the *Consumer Authority* is not.<sup>41</sup> Three already existing supervisory authorities have been designated as ‘other public authorities’ (see Art. 4, Para. 2 of *Rcpc*): the *Dutch Health Care Authority*, the *Independent Post and Telecommunications Authority* and the *Netherlands Competition Authority* belong to this group. In the case of a concurrence of competences (Article 4.2 of the *Rcpc*) the draft *AECP* gives priority to the existing ‘other authority’ to respond to the breach of consumer protection law. Finally, the draft *AECP* allows for the possibility to designate ‘bodies having a legitimate interest in the cessation or prohibition of intra-Community infringements’ (as mentioned in Art. 4, Para. 2 of the *Rcpc*).

#### *Non-discrimination and extraterritorial competences*

Because the *Rcpc* is aimed at enforcing laws that have been enacted to prohibit intra-Community collective infringements of consumer interests, the draft *AECP* is limited to that scope, with the exception of the competence of the *Consumer Authority* to (also) act against relevant infringements of a non-transboundary nature – Article 2.2 *AECP*. Thus the draft attempts to ensure that, in accordance with Consideration no. 5 of the *Rcpc*, the effectiveness with which infringements are pursued at the national level does not result in discrimination between national and intra-Community transactions. As far as the other authorities are concerned, their existing competences should already suffice for the protection of national transactions – and thus there should be no danger of discrimination.<sup>42</sup>

The draft *AECP* ensures, in Article 1.1, sub. m, that the *Dutch Consumer Authority* has the competence also to apply foreign law (this has been introduced to implement Community consumer law) so as to enable adequate responses to requests for mutual assistance. Naturally, the aforementioned ‘broadened competence’ of the *Consumer Authority* only extends to *Dutch* consumer law.

#### *Private versus public governance*

EC consumer protection law as referred to in the *Rcpc* has been largely implemented in the Netherlands in the Civil Code (CLC). Enforcement is therefore a matter for the civil courts.

The point of departure of Dutch consumer protection law is that, through and within the law, the consumer himself is able to enter into a contract and, if necessary, to protect his rights, if need be by resorting to the courts. Furthermore, consumer organisations of the kind mentioned in Article 4, Para. 2 *Rcpc* (‘bodies with a legitimate interest..’), either of Dutch origin or from abroad, can instigate a class action on the basis of Article 305a and Article 3:305c of the Dutch Civil Code (CC), demanding – if necessary before the courts – that the consumer rights which they protect be upheld. Finally, in the Netherlands there are numerous instances of self-regula-

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40 Art. 9.2, Para. 2 *AECP*, *supra* note 4; E.M.(*AECP*), *supra* note 4, p. 26.

41 This follows from the fact that the draft *AECP* distinguishes between sets of rules and regulations that are to be enforced specifically by the *Consumer Authority* or by any of the other competent authorities (see a-h in the annex: the *Dutch Consumer Authority* is only competent concerning a and b; the other competent authorities are competent concerning c-h).

42 E.M.(*AECP*), *supra* note 4, p. 5.



tion, such as procedures for out-of-court dispute settlement (also known as ‘alternative dispute resolution’)<sup>43</sup> and the joint formulation of general sales conditions.

The Dutch government takes the view that the obligation to establish a consumer authority does not necessitate a change to the existing civil law and self-regulatory provisions and arrangements. In fact, the opinion is clearly held that where private consumers are able to manage their own affairs, public law supervision should not interfere – a standpoint that is referred to as ‘*subsidiarity*’.<sup>44</sup> The responsibility for proper conduct primarily lies with the consumers and traders<sup>45</sup> themselves and should not be shifted to the consumer authority. This authority should only be called into action when collective consumers’ interests are infringed and the system of civil law enforcement is unable to generate an effective response.<sup>46</sup>

### *Dual system*

The introduction of public law provisions for the supervision and enforcement of civil consumer law (embedded in the Civil Code) is presented in the draft *AECP* as a ‘dual system’. The Dutch government presents this system as an unavoidable consequence of the *Rcpc*, especially considering the types of responses and sanctions that Article 4, Para. 6 of the *Rcpc* prescribes as the necessary supervisory and enforcement competences of the relevant authority:<sup>47</sup> the right of access to information, to be supplied with information on demand, the right of on-site inspections, to request that an infringement be terminated, to obtain from the seller or supplier an undertaking to cease the infringement (and to have this published), to require the cessation or prohibition of an infringement (and to publish the resulting decisions) and to require payments for non-compliance.

These competences are described as rights which can either be exercised by the authority itself (subject to the possibility of a judicial review), or by requesting an injunction from a competent court of law.

The Dutch government has chosen to create a new civil procedure to enable the new *Consumer Authority* to enforce *civil law* consumer protection by requesting an injunction at the civil courts. The alternative, appealing to the administrative courts, could lead to conflicting interpretations between the civil and administrative courts concerning specific concepts in the Civil Code. Furthermore, it is felt that administrative enforcement sanctions do not fit in with the protection of individual rights in the legal relationship between consumers and traders – this is because administrative sanctions only create a relationship between the Authority and the trader.<sup>48</sup>

Where the *Consumer Authority* (whether or not upon request) finds the necessary grounds to enforce *administrative law* consumer protection, such as provisions in the Prices Act (*Prijzenwet*; offering, amongst other provisions, a legal basis for prescriptions on the clarity of price lists),<sup>49</sup> it will be able to resort to administrative sanctions, which can be appealed against at an administrative court. Administrative law instruments also apply when the *Consumer Authority* is

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43 Alternative dispute settlement is an issue that is also supported by the EU; e.g. Commission Recommendation of 4 April 2001, *OJ* 2001 L 109/56, containing common criteria for consensual out-of-court procedures; the Proposal for a directive on certain aspects of mediation in civil and commercial matters, 22.10.2004, COM(2004) 718 final; and services such as the European Consumers Centre’s network (ECC-Net: [http://europa.eu.int/comm/consumers/redress/ecc\\_network/index\\_en.htm](http://europa.eu.int/comm/consumers/redress/ecc_network/index_en.htm)).

44 E.M.(*AECP*), *supra* note 4, p. 6.

45 Suppliers, providers and sellers.

46 E.M.(*AECP*), *supra* note 4, p. 6 and pp. 25 and 28. There is more on this issue in Section 4.1.

47 See also Art. 4, Para. 3 *Rcpc*, *supra* note 3.

48 E.M.(*AECP*), *supra* note 4, p. 6-7.

49 See also Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, *OJ* 1998 L80/27.

involved in merely supervisory activities, such as the above-mentioned access to information or on-site inspections.

The dual system amounts to a situation in which supervisory competences in the narrow sense (enquiries into compliance) are of an administrative nature and where enforcement takes place with administrative law instruments only if it concerns a breach of public law rules, and with civil law instruments (especially the new request procedure) when it concerns an infringement of a rule of civil law.<sup>50</sup>

### *On balance*

Thus it seems as if the Dutch government has ‘turned necessity into virtue’ when deciding on the implementation of the *Rcpc*. The need to design a ‘competent authority’, responsible for the application of the *Rcpc*,<sup>51</sup> and to bestow this authority with appropriate competences, has been combined with the need to fill gaps in consumer protection law, especially with regard to collective breaches. As a consequence a dual system will come into existence in which public responsibility and public law instruments are added to an existing, primarily civil law and self-regulatory enforcement system. Furthermore, it seems that the newly introduced *Consumer Authority*<sup>52</sup> will be a spider in a web of authorities and ‘bodies with legitimate interest’: on the one hand, it will play a part in the European network of national consumer authorities while, on the other, it will have to coordinate and fine-tune its activities with other national supervisory authorities and with national bodies with a legitimate interest.

Whether this ‘formula’ provides for proper supervisory governance requires us to look closer at the specific characteristics of the *Dutch Consumer Authority*, especially with regard to the concepts of enforcement and supervision.

## **3. Characterising the *Dutch Consumer Authority***

### **3.1. Core tasks & competences**

#### *Supervision and enforcement*

The main activities of consumer authorities as envisaged under the *Rcpc* are enforcement and supervision.<sup>53</sup> Both activities serve to uphold regulation, which in consumer protection law is mostly laid down in statutes (in the Netherlands mainly in the Civil Code), in statutory orders and, within the scale of individual legal relations, in administrative acts and contracts (including policy guidelines and general clauses). *Supervision* concerns all those activities that are employed to determine whether a certain conduct infringes existing regulations. *Enforcement*, in its most general sense, is involved with mechanisms (including supervision!) which aim to ensure compliance with existing regulations. Taken in a more restricted sense, *enforcement* is about sanctioning unlawful behaviour, with the aim being to punish or to remedy, and to compensate or remove the (causes of) infringements of existing rules.

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<sup>50</sup> See Section 4.1 for an elaboration on this issue.

<sup>51</sup> Art. 3, under c *Rcpc*, *supra* note 3..

<sup>52</sup> This authority was already established prior to the acceptance of the *AECP*. See the letter by the Undersecretary of Economic Affairs of 1 December 2005.

<sup>53</sup> Information exchange may be considered as a third activity – see, amongst others, Arts. 6 and 7 *Rcpc*, *supra* note 3.

### Regulators

The consumer authorities themselves fall within a broader category of public and private entities whose ‘raison d’être’ is to enforce and/or supervise. In the case of public offices or agencies, the term *regulators* is frequently used once these entities are equipped with powers to take (or exclusively demand) legally binding decisions and are designated to play a part in supervision.... and beyond.<sup>54</sup> The White Paper on Good European Governance underlines the importance of these regulators as follows: ‘A range of national regulatory agencies exists across the Member States in areas with a need for consistent and independent regulatory decisions’.<sup>55</sup>

The powers of these regulators may extend well beyond supervisory activities – such as the right to inspect goods, to search a house or to demand information. In their study on supervision in the Netherlands, Verhey and Verheij<sup>56</sup> found that Dutch *regulators* are equipped with *administrative powers* (to regulate, especially by individual administrative acts, such as licences), with *powers to issue rules* (for laying down generally binding norms or policy guidelines), *powers to settle disputes* (generally as an optional feature for reaching an out-of-court settlement) and *other powers* (especially to issue non-binding rulings, comments or recommendations or to give advice and present reports on the basis of research, investigations or inspections). Clearly, in practice the competences of enforcement and supervision tend to ‘overflow’ into and are combined with other competences, such as regulatory competences and dispute settlement. Matching impressions of an increasing number and variety of powers in the hands of regulators may be found in the case of European agencies.<sup>57</sup>

Considering the competences attributed to both the Dutch and some other national consumer authorities, we may conclude that enforcement and supervision are clearly their main tasks. Furthermore, we have found that although in some cases there may be regulatory powers involved, in many cases legally binding enforcement orders, especially civil injunctions and criminal penalties, can only be obtained through the courts. That does not rule out, however, that in some cases, as in the case of the *Dutch Consumer Authority*, the competence to use administrative sanctions has been bestowed upon the authority and thus, implicitly, the competence to issue policy guidelines.<sup>58</sup> Clearly, however, these regulatory competences do not amount to the power to adopt *new* consumer protection rules.

### 3.2. Types of supervision

On that final point, we should bear in mind that the tasks of supervision and enforcement, as assigned to consumer authorities, represent a specific type of supervision. Within the Dutch

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54 See, for a view on the definitions and academic debate on the European level: E. Vos, ‘Reforming the European Commission: what role to play for EU agencies’, 2000 *Common Market Law Review*, pp. 1113-1134; R. van Ooik, ‘The growing importance of agencies in the EU: shifting governance and the institutional balance’, in: D.M. Curtin and R.A. Wessel (eds.), *Good Governance and the European Union, Reflections on concepts, institutions and substance*, Antwerp 2005, pp. 125-152; T. Zwart and L.F.M. Verhey (eds.), *Agencies in a comparative and European perspective*, Antwerp 2003.

55 White Paper on European Governance, COM(2001) 428 final, *OJ* 2001 C 287/1, pp. 23-24. We will address the role of national regulators in applying Community law in Section 4.2.

56 L.F.M. Verhey and N. Verheij, ‘De macht van de marktmeester, Markt toezicht in constitutioneel perspectief’, *Handelingen NJV, 2005-I*, Deventer 2005, pp. 135-332 (The power of market regulators. Market supervision in a constitutional perspective), especially pp. 157-162.

57 See Van Ooik, *supra* note 54, p. 126 and pp. 142-144. Examples are: the *Office for Harmonisation in the Internal Market* (OHIM; Regulation 40/94/EC of 20 December 1993 on the Community trade mark, *OJ* 1994 L 11, p. 1), the *Community Plant Variety Office* (CPVO; Regulation 2100/94/EC of 27 July 1994 on Community plant variety, *OJ* 1994 L 227/1), the *European Agency for the Evaluation of Medicinal Products* (EMA; Regulation 2309/93/EEC of 22 July 1993 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products, *OJ* 1994 L 214/1) and the *European Aviation Safety Agency* (EASA; Regulation 1592/2002/EC of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, *OJ* 2002 L 240, p. 1).

58 E.M.(AECF), *supra* note 4, p. 26.

framework of supervision (also encompassing enforcement)<sup>59</sup> a distinction is made between three types of supervision, linked to three different contexts: of the conduct of citizens and companies, of the execution of public tasks by agencies and of the execution of public tasks by public offices.<sup>60</sup>

### *Supervising compliance*

The first context is most relevant for the *Consumer Authority*. It is described as *compliance supervision*, as it focuses on proper adherence to rules of conduct by citizens and companies. This type of supervision is especially important in the area of the functioning of markets,<sup>61</sup> such as *general competition supervision*, aimed at safeguarding fair trade in general, and *specific competition supervision*, aimed at enhancing the process of the liberalisation of a specific branch of public services.<sup>62</sup>

Compliance supervision also includes *supervision of market players' conduct*, aimed at ensuring that market transactions are carried out in conformity with relevant rules of conduct, such as for financial services (savings, loans, insurances and investments) and for consumer transactions (as discussed here), and, finally, the *supervision of other public interests*, aimed at safeguarding the protection and realisation of specific public interests, such as monetary stability, emission trading, food safety and access to and the quality of the media.

Clearly the *Dutch Consumer Authority* has a specific place in the supervision of market players' conduct. Regulations concerning consumer protection are likely to concern: (a) the need for transparency or proper information; (b) freedom of choice, having a real choice and being able to switch from one service provider to another; (c) fair trade, reasonable prices and sales conditions and the absence of obligatory package sales; (d) possibilities for complaints and compensation and access to reliable tribunals.

Supervision by consumer authorities will certainly have to address the above issues, especially under (a-c) and possibly under (d).

If we look back at our comparative notes (in Section 2.2) we should consider that in some countries, such as the United Kingdom and Italy, the legislator has seen fit to combine supervision of market players' conduct with general competition supervision.<sup>63</sup> Clearly, in the category of rules of conduct for market players, it is not so much the weighing of the public interest that is involved, but rather the protection of vulnerable market parties by upholding existing rules.

### *Supervising the executive*

Besides compliance supervision, *executive supervision* may be relevant to the *Consumer Authority*, as it concerns the supervision of 'good governance' by more or less independent agencies involved in the realisation or protection of certain public interests, such as schools, hospitals and supervisory agencies or regulators.

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59 BZK Policy Paper, issued by the Ministry of the Interior and Kingdom Relations (Binnenlandse Zaken en Koninkrijksrelaties), *Minder Last, meer effect. Zes principes van goed toezicht*. (Less of a burden, improved effectiveness; six principles of good supervision), October 2005. Presented by the Minister of the Interior on 12 October 2005.

60 The main difference between the latter two is that *public offices* reside within the realm of government under political responsibility and ministerial/parliamentary control, whereas *agencies* operate on their own account.

61 Verhey and Verheij, *supra* note 56, pp. 146-147 (with references).

62 In the Netherlands general competition supervision rests with the Netherlands Competition Authority. Specific supervision rests with specific agencies for specific areas: the *Independent Post and Telecommunications Authority* (OPTA), the *Directorate for Supervision in Energy Affairs* (DTe) and The *Dutch Health Care Authority* (NZa). Ideally, once liberalisation has been completed, this type of supervision should cease and only the general competition supervision should remain.

63 It goes beyond the scope of this article to determine which internal arrangements have possibly been put into place to separate the treatment of these different domains.

Generally speaking, executive supervision is a task that lies with politically responsible branches of government, such as (inspectors of) ministries (assigned with overall responsibility for a certain public interest). Presently, the *Dutch Consumer Authority* is conceptualised as a part of the Ministry of Economic Affairs. Therefore executive supervision will be a matter of intra-departmental procedures of management control. Should the *Consumer Authority*, as is a possibility in four years time,<sup>64</sup> be restructured as an independent agency, as in the case of the ‘sister authorities’ in the United Kingdom, Italy, Ireland and Denmark, then the aspect of executive supervision will become highly relevant; as the authority will then operate outside ministerial responsibility, alternative mechanisms of public accountability will have to be considered.

The preliminary question, however, is why greater independence on the part of supervisory authorities would be beneficial. Policy documents present a variety of desiderata, both in terms of suitable circumstances for or the advantages of creating independent regulators:<sup>65</sup> the need for independent and specific, technical or sectoral expertise; increased visibility of policy activity and carrying out administrative tasks with a great necessity for public participation; cost saving and managing large amounts of individual administrative decisions without discretionary judgements; the possibility for political-executive offices (such as cabinets and the European Commission – and its members)<sup>66</sup> to focus on core issues. Clearly, some of these considerations strike a chord with consumer authorities.

In the Dutch debate on the choice for independent regulators, with regard to privatisation and liberalisation the view is held that in the early stages, when there is a greater need for regulation, supervision should be subject to ministerial responsibility. As liberalisation progresses, less policy steering is required and the supervisory authorities can be placed outside ministerial responsibility (and specific supervision could ideally merge into *general competition supervision*).<sup>67</sup> The same line of reasoning could be applied to supervision by consumer authorities – as the Dutch government indeed suggests.<sup>68</sup> Taking this point even further, one could indeed argue that as liberalisation becomes fully settled, public supervision and enforcement could be traded in for private and self-regulatory supervision and enforcement; or at least a mix of supervisory mechanisms could be applied. In our case of consumer authorities, the backdrop is not so much liberalisation, but intra-Community protection (and ‘filling in the gaps’); an opposite approach (to liberalisation) therefore presents itself: ‘*publicisation*’.<sup>69</sup>

### *Inter-executive supervision*

The third type of supervision, *inter-executive supervision*, is concerned with safeguarding ‘good governance’ in the execution of public tasks by lower public offices. This may well be relevant to the consumer authorities under the *Rcpc*, especially when the European Commission supervises whether Member States (and their authorities) effectively implement Community regulations, such as the consumer laws in the Annex of the *Rcpc*.

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64 Art. 9.2 *AECP*; E.M.(*AECP*), *supra* note 4, p. 26 and 57.

65 For a EU source, see: White Paper, *supra* note 55, p. 65. For a Dutch source, see: Art. 124 of the Dutch Legislative Drafting Rules; L.F.M. Verhey, ‘Good Governance: Lessons from Constitutional Law’, in: D.M. Curtin and R.A. Wessel (eds.), *Good Governance and the European Union, Reflections on concepts, institutions and substance*, Antwerp 2005, pp. 49-67, notably p. 65; Verhey and Verheij, *supra* note 56, p. 203; the BZK Policy Paper, *supra* note 59, p. 12.

66 By default these are the exclusive ‘offices’ for the execution of national and European regulations; see, for the EU, Van Ooik, *supra* note 54, p. 126, and, for the Dutch concept of systemic ministerial responsibility, Verhey and Verheij, *supra* note 56, pp. 191-192.

67 Verhey and Verheij, *supra* note 56, p. 165 and pp. 200-201.

68 E.M.(*AECP*), *supra* note 4, p. 26 (there is little experience with public supervision of adherence to civil consumer law).

69 This term may present itself as a neologism. It is the English synonym for the Dutch ‘publicisering’, and stands for a transformation into public law.



### *Principles of supervision?*

In the previously mentioned Dutch *BZK paper* on principles of good supervision, six general principles are listed that may also offer an interesting standard for consumer authorities:<sup>70</sup> *selectivity* (if possible, the government should leave supervision and enforcement to civil society and restrict itself to offering a safety net); *decisiveness* (supervision should be effective); *cooperation* (putting limits on the burden of supervision by improved cooperation between the manifold supervisors); *independency* (acting in a trustworthy fashion and independent from political or other partisan opinions or interests); *transparency* (giving reasons for supervisory policies and activities and applying openness); *professionalism* (on each level of supervision: the individual supervisor, the supervisory agency and the occupational group; integrity, coherence and improving competences are the key criteria).

If we apply these principles to the *Dutch Consumer Authority* at least four important questions arise:

1. the draft AECP advocates that the Authority will operate (*selectively*) as a ‘safety net’, but will it be able to restrict itself to this role if intra-Community trade increases?
2. Will the *cooperation*, which is envisaged in agreements between the *Dutch Consumer Authority* and other public supervisors and private legitimate bodies, create sufficient *trust* among the players and with the consumers to avoid a ‘consumers’ Babylon’?
3. Similarly, will the new system of a European network and national networks create sufficient *transparency* to sustain trust and to provide for effectiveness and efficiency?
4. Finally, will the Authority be able to operate *independently* or is ministerial influence unavoidable given the vulnerability of the national supervisory network and the liability of the state *vis-à-vis* the Community (and how will this affect the quest for professionalism)?

Clearly these questions require answers, although some may only prove to be answerable in practice and over time. Now that we have positioned the *Consumer Authority* within the context of supervision, the leading question in this contribution remains our only focus.

## **4. Governing supervision**

How is the new supervisory governance structure of national consumer authorities going to operate, especially with regard to (1) the concurrence of and coordination between civil law and administrative law arrangements and (2) the matter of the locus or loci of responsibility for supervision in light of the Dutch dualism and subsidiarity?

Each of these two subjects will be addressed separately. The multilevel aspect of these subjects may be phrased as a cross-cutting question: does top-down European regulation, in this case by the *Rcpc*, distort or, instead, support existing national arrangements of civil law and self-regulatory enforcement? Another cross-cutting question may be posed by taking the *multi-actor* perspective; how can the consumer authority (primarily the *Dutch Consumer Authority*) coordinate its efforts in and between the European network and the national networks in which it is involved – especially with a view to the allocation of responsibility and upholding, nationally, dualism and subsidiarity?

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70 BZK Policy Paper, *supra* note 59, p. 18.

#### 4.1. Coordination between public and private law

##### *The Rcpc (EC Regulation on consumer protection cooperation)*

The *Rcpc* offers little guidance as to the question of the division between civil law and public law in the area of consumer protection law. In the Explanatory Memorandum, however, some remarks are made on the question of why a network of *public* authorities is deemed to be necessary.<sup>71</sup>

First of all, the competences involved in supervising and enforcing Community consumer protection law need to be *unilaterally binding* – such as in the case of investigatory powers.<sup>72</sup> Furthermore, the use of these powers will require guaranteed *confidentiality* and professional secrecy.<sup>73</sup> The Memorandum also presents public authorities as having a proven reputation for *speedy, efficient, effective and comprehensive* enforcement, which is considered an important deterrent to rogue traders.<sup>74</sup> *Impartiality and accountability* are presented as being more effective when authorities act in the public interest than when supervision and enforcement are left to private entities. Furthermore, mutual assistance depends upon *reciprocal rights and obligations* (ensuring effective protection in cross-boundary situations) and reciprocity warrants equivalent public authorities in each Member State: ‘The mutual assistance rights provided in the regulation should therefore only be entrusted to public authorities.’<sup>75</sup> Private bodies can play their part, but primarily with regard to domestic consumers.

Secondly, the Memorandum ascertains that a large majority of the Member States have recognised ‘the value of a public dimension to their enforcement systems’, and it builds on this to present the creation of a network of public consumers’ authorities at the EU level as a necessary assurance for Member States to adopt, in the future, the maximum harmonisation of consumer protection laws (such as the directive on unfair commercial practices) – because ‘consumers will be protected by equally effective public authorities when shopping cross-border’.<sup>76</sup> This point is also reiterated with regard to the enlargement of the internal market, since the proposed regulation is said to be an opportunity to ensure effective enforcement in the new Member States.

Finally, the Memorandum reminds us<sup>77</sup> that because its scope is limited to cross-border infringements, the regulation does not compel Member States to change their arrangements for domestic infringements. Furthermore, new public authorities are not necessarily required in those Member States that currently lack such authorities, because the limited responsibilities of the regulation could be given to existing public authorities – for instance to public authorities responsible for the enforcement of competition law matters.<sup>78</sup>

Clearly, the *Rcpc* presents a confident choice for public supervision, but it also allows for a continuation of existing domestic civil law and self-regulatory<sup>79</sup> systems of consumer protection law.

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71 E.M.(*Rcpc*), *supra* note 2, p. 7-8.

72 The same would apply to sanctions, but the *Rcpc* leaves open (in Art. 4, Para. 4) the possibility of Authorities not being able to apply sanctions themselves but having the competence to request such sanctions from the courts.

73 *Ibid.*, under no. 34.

74 *Ibid.*; stating that there is proof that some rogue traders already exploit the gaps in countries without public enforcement.

75 *Ibid.*

76 *Ibid.*

77 *Ibid.*, under no. 35.

78 *Ibid.*, under no. 36; the Memorandum goes on to say that there is a possible positive synergy between the consumer protection and competition dimensions of market surveillance and enforcement.

79 See footnote 43.

*The draft AECP (Act on the Enforcement of Consumer Protection)*

So how did the Dutch government take up the challenge? Indeed we have found that enforcing consumer protection law in the Netherlands is primarily a *civil law* matter and that the consumer himself is considered to be capable of protecting his own rights, if need be in an out-of-court procedure, or in the civil courts. Furthermore, private ‘bodies with a legitimate interest’ may engage in self-regulatory cooperation with (organisations of) traders, for instance in adopting general sales conditions, and they may also commence a civil law class action.

The Dutch legislator has adopted the *Rcpc* view that the obligation to establish a consumer authority does not necessitate a change in the existing civil law and self-regulatory provisions and arrangements. *Subsidiarity* is the key and public supervision should be regarded as a safety net. Furthermore, a *dual system* is designed to ensure that (European and additionally national) public law requirements are met (especially the responses and sanctions prescribed in the *Rcpc*), without disturbing the existing fabric of civil consumer law – or rather, expanding on civil law by creating a new civil injunction procedure (Art. 305d CLC).<sup>80</sup>

It should be reiterated that the *Dutch Consumer Authority* only enforces consumer protection law as listed under a. and b. of the *AECP* Annex – see Article 2.2, Para. 1 *AECP*. This annex lists both the relevant regulations and directives and concerning the latter also the statutes by which these directives were implemented.

The regulations under a., which are all directives, have been implemented in the CLC and are enforced through civil law means, such as the new and speedy civil procedure of a request for an injunction (Art. 2.5) and the right to request a civil court to declare that agreements on class-compensation for damages (to which the *Dutch Consumer Authority* is a party) are generally binding.<sup>81</sup> The main subjects of civil law protection are misleading advertising,<sup>82</sup> travel arrangements, general sales conditions, time-sharing arrangements, distant sales, consumer sales and guarantees and, finally, e-commerce.

The regulations under b., again only directives, are implemented in public law statutes: the Act on door-to-door or street sales (or hawking) and the Prices Act. These can only be enforced through administrative law enforcement; on demand for mutual assistance with regard to an intra-Community breach of consumer protection law (Art. 2.7, Para. 3).<sup>83</sup> The main administrative instruments are: the administrative order subject to a penalty (Art. 2.8), the administrative penalty (Art. 2.9) and the public announcement on the use of one or both of these sanctions<sup>84</sup> and of refraining from such use on the basis that an undertaking by the trader has been agreed upon (Art. 2.16).<sup>85</sup>

The administrative law supervisory competences apply generally, regardless of whether a (suspected) infringement concerns civil or public consumer protection law. Article 2.4 *AECP* regulates the appointment of civil servants as supervisory officials and, once appointed, these officials are equipped with the supervisory powers listed in the General Administrative Law Act.

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80 See Art. 8.1 draft *AECP*, *supra* note 4. An administrative procedure was rejected due to the fear of diverging interpretations of CLC provisions.

81 Chapter 2, § 2 *AECP* (civil law enforcement). See also E.M.(*AECP*), *supra* note 4, p. 17 and p. 33-34.

82 Also a subject under self-regulation. The *Dutch Advertising Code Foundation*, a legal entity in which traders, consumers and media organisations have joined, has adopted a code and provides for complaints settlements which can be appealed before an administrative court.

83 See E.M.(*AECP*), *supra* note 4, p. 17 and Para. 5.2, p. 31-33. See also Chapter 2, § 3 *AECP* (Administrative Law enforcement), *supra* note 4.

84 Because the one sanction is retributive and the other punitive, Dutch administrative law determines that they can be applied simultaneously.

85 If an infringement is of a strictly domestic nature, the enforcement instruments of the particular statute apply – see Art. 2.17, par. 3 *AECP*, *supra* note 4.

The dual system preserves the existing system of mainly civil law consumer protection (through self-regulation), while adding instruments for intra-Community infringements. The *Consumer Authority* is built, as the Explanatory Memorandum puts it,<sup>86</sup> on a ‘civil foundation’. Apart from individual consumers being considered to be able to stand up for their own rights, this foundation is the result of consumers organising themselves (or being organised), such as in the Consumers’ Association (Consumentenbond). Together with (organisations representing) traders these consumers’ organisations have adopted self-regulatory arrangements and organisations, such as the *Dutch Advertising Code Foundation* and the *Consumer Complaints Foundation*,<sup>87</sup> which are important players in dealing with consumers’ complaints. Furthermore, the consumer organisations, as ‘bodies with a legitimate interest’ may commence class actions in the case of a collective infringement of consumer protection law.

Given this ‘civil foundation’ the Dutch government has formulated the *subsidiarity* principle. Outside a request for mutual assistance, this principle means that the *Consumer Authority* will only act: (1) in the case of collective breaches of consumer protection law and (2) when the market seems incapable of enforcing consumer protection law through self-regulation or civil procedures.<sup>88</sup> Especially the second requirement, which expresses the subsidiarity principle, requires some mode of cooperation between the Consumer Authority and the domain of private (collective consumer) initiatives. To this effect the *AECP* offers three important public-private arrangements.

Firstly, the *AECP* facilitates, in Article 6.1, the adoption of so-called cooperation protocols for bilateral agreements between, on the one hand, the *Consumer Authority* and, on the other, consumers’ organisations and joint organisations of consumers and traders (such as the previously mentioned foundations). These protocols may be about offering information to consumers (referring to proper information offices), dispute settlement,<sup>89</sup> making use of the instrument of class actions and the (new) injunction request procedure,<sup>90</sup> as well as exchanging information on new developments and trends.<sup>91</sup>

Secondly, the *AECP* obliges (in Article 6.3) the *Consumer Authority* to set up institutionalised social deliberations, at least once every three months, with organisations representing consumers and traders, as a means to coordinate the *Consumer Authority*’s task of executing the *AECP* with private initiatives and to exchange information about developments and trends relevant to consumer protection. Apart from their direct practical use, these deliberations are considered an important aspect of providing accountability towards stakeholders; not only should the *Consumer Authority* be accountable through the mechanism of ministerial responsibility, but also – in terms of good governance – through public accountability.<sup>92</sup>

Thirdly and finally, but this time within the scope of mutual assistance, as proposed in Article 8, Para. 3 *Rcpc*, the competent authorities may decide to involve ‘legitimate bodies’ in the process of mutual assistance. Art. 6.2 *AECP* takes up this ‘challenge’ by allowing for the possibility of designating such bodies by statutory order. In fact, the *Dutch Advertising Code Foundation* already fulfils a task in the implementation of the Television without frontiers

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86 E.M.(*AECP*), *supra* note 4, p. 28 and p. 47.

87 <http://www.reclamecode.nl/indexengels.html> and <http://www.sgc.nl/>

88 E.M.(*AECP*), *supra* note 4, p. 28 and p. 47.

89 Especially important to the above-mentioned foundations.

90 Coordinating efforts to curb collective infringements.

91 *Ibid.* (also p. 49).

92 E.M.(*AECP*), *supra* note 4, p. 50. With reference to a report by the Dutch Scientific Council for Government Policy: *Visie op markttoezicht* (Outlook on market supervision), 18 June 2004, *Kamerstukken II* 2003-2004, 29 200, no. 50.

directive,<sup>93</sup> for which the European Commission has accepted self-regulation as a proper means of implementation, which may now be continued under the *AECP*. Thus the subsidiarity principle can also operate under mutual assistance, albeit that the competences of the competent authority will remain in place should the ‘legitimate body’ fail in its response to the request (see also Article 8, Para. 3, final phrase *Rcpc*).<sup>94</sup>

As these arrangements give operational meaning to the subsidiarity principle, they will relate to the possible use of civil law instruments by private parties as against the possibility of the *Consumer Authority* using its competences. As to the latter, the arrangements will have a bearing both on civil law and on administrative law instruments. When subsidiarity prevails, civil law instruments, in the hands of private parties, will also prevail; once a *Consumer Authority* intervention is considered unavoidable, the choice of instruments depends on the nature of the regulations that the rogue trader has (probably) infringed. Clearly, when a request for mutual *supervisory* assistance has been made, the likelihood of administrative law instruments being used increases. Firstly, it may well prove difficult for a branch organisation to design self-regulatory, yet binding mechanisms that commit individual traders to provide information. Secondly, once the *Consumer Authority* does have to step in, it will only have administrative law supervisory instruments at its disposal.

#### *Towards publicisation?*

While preparing the draft *AECP*, the *ful-publicisation* of Dutch consumer protection law was considered as an alternative to the *dual system*.<sup>95</sup> All public and civil consumer protection law would be enforced by administrative law. A clear advantage would have been that all supervision and enforcement would be ‘in one pair of hands’. It would have required, however, a full regulatory overhaul – transposing all civil law remedies into administrative legislation. Furthermore, *ful-publicisation* would end the benefits of the existing predominantly civil law and self-regulatory system (*vide* ‘the private foundation’). Finally, such a fundamental transformation would pose a considerable risk of having both the civil courts and the administrative courts interpreting and applying concepts and provisions of the Civil Code differently and thus creating legal uncertainty.<sup>96</sup>

#### *Possible strains*

So, the dual system has prevailed and in theory it offers a clear distinction, linked to different sets of civil or public consumer protection regulations. In practice, though, this separation of regimes may be difficult to manage when intra-Community trade intensifies and, subsequently, the number of requests for mutual assistance increases – with more speedy transactions through the Internet. Both foreign and domestic partners in supervision and enforcement may then expect the *Consumer Authority* to respond more rapidly and with more effective and efficient instruments – if need be with administrative orders, even when private consumer law is at stake, or by disregarding possible self-regulatory options. This may lead to a strain on the domestic cooperation between the *Consumer Authority* and other public and private partners.

In four years time the functioning of the dual system will be subject to an evaluation (Art. 9.2 *AECP*), also with regard to the cooperation within the domestic network. Should the dual

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93 Directive 97/36/EC, OJ 1997 L 202.

94 E.M.(*AECP*), *supra* note 4, pp. 47–48. See also the earlier remark – in note 17 – that no competences are transferred.

95 *Ibid.*, pp. 30–31.

96 Again, under the *AECP* supervision is exclusively a matter of administrative law.



enforcement system prove more burdensome than the (expected) disadvantages of a transformation into a public law system, then a fundamental transformation is still on the cards.<sup>97</sup>

## 4.2. Responsibility

### *Working in networks*

Clearly, the element of the new networks of public and private partners in supervising and enforcing consumer protection law is an important feature of the new system. Considering the three main tasks of the *Consumer Authority*<sup>98</sup> (the single liaison office,<sup>99</sup> the main supervisory and enforcement authority<sup>100</sup> and – outside legal tasks – the Information office for consumers and traders),<sup>101</sup> the relations with other liaison offices,<sup>102</sup> other competent authorities,<sup>103</sup> other public offices<sup>104</sup> and with legitimate bodies<sup>105</sup> are of the utmost importance. In fact, these relations emerge as networks, as there is a structural need (within or outside requests for mutual assistance) to coordinate the use of supervisory and enforcement powers, as well as to exchange or share information on relevant trends and developments in consumer law (practice).

Firstly, there is the European network of public authorities, set up according to rules which follow directly from the *Rcpc*, especially from Articles 6-9 (obligations) and Articles 11-15 (responsibilities and conditions).

Secondly, there are several domestic networks with other competent authorities, with other public offices and with legitimate bodies. These are regulated in part by provisions of the *AECP* (Art. 2.17, Art. 3.11, Art. 4.3-4 and Art. 6.3)<sup>106</sup> and by agreements laid down in the previously mentioned cooperation protocols. According to Article 5.1 and Article 6.1 *AECP*, nationally these cooperation protocols are to be formulated for coordination and cooperation between all the competent authorities, offices and bodies, also with regard to the interpretation of certain legal concepts and terms and to the application of provisions of consumer protection law.<sup>107</sup> Especially with regard to mutual assistance, but also in other cases of coordinated efforts, some measure of agreement will be necessary. Article 4.3 *AECP* states that on the terms and concepts of civil law *coordination* suffices (as, finally, the courts will authoritatively decide on the matters in question); but in the case of terms and concepts of administrative law, *agreement* is necessary (as public office has a primary right of interpretation).<sup>108</sup> In both cases these joint interpretations will be of great importance to the practice of supervision and enforcement.

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97 E.M.(*AECP*), *supra* note 4, p. 52 (and pp. 72-73).

98 *Ibid.*, Chapter 4, pp. 24-30.

99 Art. 3, under d *Rcpc*, *supra* note 3, and Art. 2.3, Para. 1 *AECP*, *supra* note 4.

100 Art. 3, under b *Rcpc*, *supra* note 3, and Art. 2.2 *AECP*, *supra* note 4; E.M.(*AECP*), *supra* note 4, p. 30-31.

101 *Ibid.*, p. 27-28.

102 Art. 6, 7, 8 and 9 *Rcpc*, *supra* note 3.

103 See also Art. 3.11 *AECP* (the duty to provide relevant information), *supra* note 4. All competent authorities are under an obligation to respond to requests for mutual assistance – Art. 6-9 *Rcpc*, *supra* note 3. The ‘other competent authorities’ may also apply their regular, existing enforcement competences.

104 Art. 4, Para. 2 of *Rcpc*, *supra* note 3, and Chapter 3 *AECP*, *supra* note 4. In case of concurrence, the sectoral competences of the ‘other authorities’ will prevail (as they are considered to offer a higher level of protection) – Art. 4.2, Para. 2 *AECP*, *supra* note 4; E.M.(*AECP*), *supra* note 4, p. 41.

105 E.M.(*AECP*), *supra* note 4, pp. 27-28.

106 Required on the basis of Article 11, Paras. 2 and 3 *Rcpc*, *supra* note 3.

107 E.M.(*AECP*), *supra* note 4, pp. 42-43.

108 *Ibid.*, p. 43.

### *Taking responsibility*

A major concern is how public responsibility for consumer protection is distributed through these different networks, especially with regard to positioning the *Consumer Authority* in a dual system operating on the basis of subsidiarity. Clearly, the *Consumer Authority* embodies the *hybrid* character of the new Dutch supervisory governance in consumer protection law.

On the one hand, the *Consumer Authority* is part of a *vertical/hierarchical* governance system, in which public law competences and public responsibility dominate (nationally, the Dutch Minister for Economic Affairs and, on the EU level, the European Commission).

On the other hand, the *Consumer Authority* takes part in a *horizontal/reciprocal* governance system, in which it interacts in a non-hierarchical manner with other public and private supervisors and legitimate bodies, both on the European and on the national level.

In this hybrid governance context,<sup>109</sup> public responsibility needs to be in tune with the requirements of subsidiarity and dualism, or with the view that the *Consumer Authority* must provide intra-Community safeguards, whilst at the same time allowing for market relations to self-regulate consumer-trader relations and to offer an out-of-court system for the settlement of conflicts – in other words: limiting its interventions to situations of collective *market failure*.

In two respects attuning (vertical) public responsibility to (horizontal) networking may prove difficult. Firstly, it may be too difficult to give the *Consumer Authority* sufficient room to operate as an independent actor within the ‘horizontal/reciprocal’ national networks and to take part in, or to assist in the workings of the self-regulatory consumer protection system,<sup>110</sup> instead of the *Consumer Authority* being placed outside these networks, because it is primarily seen as part of the ‘public law regulatory machinery’ – as a result of the influence of the mechanism of ministerial responsibility.

Secondly, there may be insufficient safeguards to avoid that operating within the European network, under the responsibility of the European Commission, places the *Consumer Authority* (as part of the ‘public law EU machinery’) outside the national scope of subsidiarity and dualism (and operating rather as a countervailing power under EU responsibility as against Member States’ discretion).

In both respects it seems appropriate to place the *Consumer Authority* outside vertical *regulation* (both under European and under national responsibility). At the same time it may be necessary to underline the importance of national discretion, under ministerial responsibility, so as to protect the typically Dutch system of consumer protection against unwanted (further) publicisation.

### *Responsibility and the national networks*

As specific competences are attributed to the *Dutch Consumer Authority*, it will be able to act according to its *own* specific supervisory and enforcement powers, *i.e.* according to its own legal authority.<sup>111</sup> Organisationally it belongs to the Ministry of Economic Affairs, as a separate division directly under the Secretary-General.<sup>112</sup> Thus, on the one hand, the *Authority* has its own

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109 This is not the place for an exposure of the views on the concept of governance. For a recent overview see: Oliver Treib, Holger Bähr and Gerda Falkner, ‘Modes of Governance: a note towards conceptual clarification’, *European Governance papers* N-05-02 (ISSN 1813-6826), 17 November 2005, <http://www.connex-network.org/eurogov/>

110 Reciprocity warrants equivalence or the certainty that none of the parties concerned have an exclusive right or power over other parties.

111 Related to (possible) breaches of only the legislation listed in the Annex – apart from the matter of the application of foreign consumer protection law (see Section 2.3).

112 The highest civil servant within a ministerial department.

powers and is – formally speaking – detached from the policy-making (regulatory) divisions<sup>113</sup> while, on the other hand, *full* ministerial responsibility continues to apply.<sup>114</sup>

In contrast to ‘full ministerial responsibility’, ‘limited ministerial responsibility’ applies in cases of public services rendered by independent agencies – as in the future may also be the case for the *Dutch Consumer Authority*.<sup>115</sup> Under Dutch law there are two avenues through which a minister can exert his powers concerning such independent agencies. Firstly, on the basis of *specific* competences that a minister often still retains, such as the ability to appoint and dismiss officials, the right of approval or dismissal concerning the agency’s decisions, the power over the funding and budget of the agency and powers to intervene when the agency seriously neglects its responsibilities.<sup>116</sup> Secondly, the minister is still considered to retain a so-called *systemic* responsibility. This responsibility is based on his or her ability to take the initiative towards the adoption of new legislation concerning the supervisory and enforcement framework within which the agency operates.<sup>117</sup>

Presently, these different competences and responsibilities need not be separated, as there is full ministerial responsibility over the *Consumer Authority*. This allows the minister to issue instructions, not only of a general nature (in the form of policy guidelines) but also specific instructions (pertaining to one particular case). As for the use of policy guidelines, under Dutch law an administrative office is allowed to set these rules aside if in a particular case acting in conformity with such a rule would result in a disproportional disadvantage.<sup>118</sup> Naturally, this also applies to the *Consumer Authority*. Furthermore, the fact that specific supervisory and enforcement competences have been assigned to the *Consumer Authority*, instead of to the minister, confirms that the *Consumer Authority* should be able to act, as far as possible, of its own accord, as it also implies that – under Dutch law – the *Consumer Authority* is allowed to also adopt its own policy guidelines. In practice the minister should make full responsibility ‘feel’ like limited responsibility.<sup>119</sup>

At the same time it should be well understood that all other competences pertaining to the *Consumer Authority* – such as the annual report to the European Commission *and* the signing of cooperation protocols with other supervisors and with legitimate bodies – rest explicitly with the minister! That is to say that the willingness to cooperate and the conditions for cooperation are to be agreed upon by the minister.<sup>120</sup>

So, with regard to operating in horizontal, national networks, we may conclude that the boundaries are set by the minister and the use of the *Authority’s* (own) competences will have to be in accordance with certain protocols. Not only for strictly legal reasons, but also to avoid the situation where the necessary *trust* in making these reciprocal networks work will be undermined. By the same token, the minister should aim to arrive at cooperation protocols that allow for sufficient discretion, so as to offer the *Consumer Authority* sufficient opportunity to create trust

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113 With the aim of ensuring its independence and for the sake of transparency. Note that within the Authority itself an organisational division will be made between supervision, sanctioning and administrative reviews. See E.M.(AECF), *supra* note 4, p. 28.

114 Art. 2.1, Para. 1 AECF, *supra* note 4; E.M.(AECF), *supra* note 4, p. 25-26.

115 An evaluation, also of the organisational aspects, is due in four years. See Art. 9.2, Para. 2 AECF, *supra* note 4; E.M.(AECF), *supra* note 4, p. 26 and p. 57.

116 BZK Policy Paper, *supra* note 59, p. 16. In fact, examples of executive supervision (see Section 3.2, under b.).

117 Verhey and Verheij, *supra* note 56, pp. 191-192.

118 In doing so too readily (to the liking of the Minister) the *Consumer Authority* could be confronted with a disciplinary response from the minister; but, legally speaking, the decision taken will still ‘stand’.

119 E.M.(AECF), *supra* note 4, p. 26; especially by refraining from specific instructions (in individual cases).

120 E.M.(AECF), *supra* note 4, pp. 26-27 and pp. 44-45. The protocols with other competent authorities and with other public offices will have to be agreed upon with other ministers or with boards of independent government agencies.

within the network. Finding the proper balance between regulation and discretion will be a major challenge – in fact regardless of whether full or limited ministerial responsibility applies.

### *Responsibility and the European network*

The *Rcpc* has the legal provisions on mutual assistance and cooperation in the European network – in Articles 6-15. In the course of cooperative practice, further, more specific conditions for issuing and handling requests for mutual assistance, or for the sake of information exchange, may be developed. These informal agreements may interfere with both the ministerial influence on the *Consumer Authority* and with the specific features of Dutch consumer protection law (subsidiarity and dualism); indeed all the more so if and when the European Commission actively participates in the network (either within or outside the boundaries of Arts 16-17 *Rcpc*).

On the face of it, the Community's (or Commission's) role in this context is limited to supporting measures which raise the standard of enforcement generally and which improve the ability of consumers to enforce their rights (promoting the exchange of best practices).<sup>121</sup> The network should be complementary to existing enforcement mechanisms.<sup>122</sup> Still, setting a course of action in support of cooperation and of the coordinated effort of supervision and enforcement may involve exchanges of officials between the competent authorities, national actions on information, advice and education, consumer representation, the extrajudicial settlement of disputes, access to justice and statistics. Clearly, agreement on these issues may have a strong effect on the workings of consumer authorities. The Community's impact could reach even further when partners within the network, including the Commission, jointly decide upon the applicability or interpretation and application of (intra-)Community consumer law.

Such a development may give rise to the question whether (nationally) ministerial responsibility for the *Consumer Authority* will still be able to function effectively. This question has also arisen in the wake of a number of similar networks that have been created over the last decade,<sup>123</sup> such as in: telecommunications,<sup>124</sup> energy,<sup>125</sup> food safety,<sup>126</sup> monetary policy<sup>127</sup> and general competition supervision.<sup>128</sup> In some networks the Commission even has the explicit power to take decisions which are binding on network participants.<sup>129</sup> Although this is not the case in the *Consumer Authority's* network, the Commission may nevertheless still see fit to present recommendations or guidelines, by which the authorities and the Member States have to abide – in view of Article 10 EC Treaty (the principle of loyalty). This may well curtail the possibility for a minister to (nationally) influence the behaviour of the *Consumer Authority* by means of policy guidelines or otherwise, whilst at the same time Member States may still be held liable for the failure, by their own – subordinate – authority, to enforce Community legislation.<sup>130 131</sup>

121 Chapter IV, Art. 16-18 *Rcpc*, *supra* note 3; these Articles suggest that substantive matters will be decided upon in due course and by the Member States and the Commission jointly – see also: E.M. (*Rcpc*), *supra* note 2, no. 34 and nos. 44-48.

122 See the emphasis in opinion of the ECLG, *supra* note 5, p. 3.

123 Verhey and Verheij, *supra* note 56, p. 166.

124 Commission decision 2002/627/EC, *OJ* 2002 L 200/37 – amended 2004/641/EC, *OJ* 2004 L 293/30.

125 Commission decision 2003/796/EC, *OJ* 2003 L 296/34 (the European Energy Regulators Group).

126 Regulation (EC) no. 178/2002 of 28 January 2002, *OJ* 2002 L 31/1.

127 The European System of Central Banks; Art. 8 EC Treaty. This system effectively shuts out Member States' influence.

128 Regulation (EC) no. 1/2003 of 16 December 2002, *OJ* 2003 L 1. See also *OJ* 2004 C 101.

129 As in telecommunications; Directive 2002/21/EC of 7 March 2002, *OJ* 2002 L 108/33.

130 See also the BZK Policy Paper, *supra* note 59, p. 13.

131 An interesting example of this problem is offered by the case of the regulation on executive agencies responsible for managing one or more Community programmes (Council Regulation (EC) 58/2003 of 19 December 2002, *OJ* 2003, L 11/1) – see Van Ooik, *supra* note 54, pp. 144-145.

Furthermore, the possibilities for upholding the typically Dutch system of consumer protection (especially subsidiarity and dualism), may come under threat, as a European regulation overrules national responsibilities.

### *Legitimacy and trust*

The legitimacy of decision-making in European networks of supervisors, also considering the role of the Commission within these networks, is questionable. Some authors even speak of a clear danger that (formally or de facto) independent agencies will gradually be ‘sucked out of their national institutional structures’, without there being proper democratic compensation within the networks.<sup>132</sup> The opportunity to introduce horizontal or alternative means of accountability, such as being directly accountable to Parliament, stakeholders’ participation,<sup>133</sup> and active openness may be worthwhile manifestations of ‘good governance’<sup>134</sup> and thus soften democratic vulnerability, but they can hardly be expected to offer full compensation.<sup>135</sup>

This viewpoint should be taken into consideration when the European Consumers’ Network kicks off, especially as a shift towards European dominance may well put national attempts at preserving and building upon ‘civil foundations’ at risk.<sup>136</sup> The *Rcpc* is presented as a framework that allows for national consumer protection schemes to retain their specific characteristics. If this is to be taken seriously, the European network definitely needs to restrain itself and, nationally, authorities should ideally operate as agencies, as this offers them the opportunity to interact with public and private ‘partners’ on a reciprocal basis. Setting the ground rules for such reciprocity and interaction could *and* should remain a ministerial responsibility. This responsibility would serve to uphold national choices against possible European policy dominance through the agencies as parties to the European network. At the same time this responsibility should not be taken up to over-regulate cooperation protocols, as this could easily be seen as placing little trust in the *Consumer Authority*. Smart regulation is clearly required in order to find the right balance.

## **5. In conclusion**

How is this new supervisory governance structure of consumer authorities going to operate, particularly with regard to the coordination between civil and administrative law and the division of responsibility for supervision in a system of dualism and subsidiarity? In the above text this leading question has given rise to many elements and aspects, questions and possible answers. As always, ‘the proof of the pudding is in the eating.’ Nevertheless there are – unfortunately – already some signs that call for caution. Finding the proper balance in policy practice may prove difficult; multilevel cooperation should not infringe on domestic systemic discretion and ministerial responsibility, but at the same time, nationally, ministerial responsibility should not infringe on the authorities’ capacity to enter into reciprocal networks which are of critical importance in upholding subsidiarity and dualism. This challenge may well prove to be too difficult and lead to a ‘regulatory overstretch’<sup>137</sup> and a subsequent lack of transparency and the

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132 Verhey and Verheij, *supra* note 56, pp. 321-322.

133 With all the dangers of regulatory capture.

134 The Explanatory Memorandum to the AECF refers to the obligation of ‘institutionalised social deliberations’ with organisations of consumers and traders as an important instance of good governance. E.M.(AECF), *supra* note 4, p. 50.

135 Similarly Verhey and Verheij, *supra* note 56, p. 252.

136 See the ECLG insistence, as referred to in note 122.

137 If only we consider the many cooperation protocols, recommendations and positions that will be the result of working in networks...



danger of a failure to create trust, effectiveness and efficiency. Both cross-cutting questions, related to our leading question, serve to illustrate these concerns.

The first cross-cutting, *multilevel*, question was whether top-down European regulation, in this case by the *Rcpc*, distorts or supports existing national arrangements of civil law and self-regulatory enforcement. The answer may well be that the regulation seems to offer support in that it allows for a *dual system* and *subsidiarity*, as introduced by the Dutch government. Nonetheless the dual system may well prove to be insufficiently resilient in the wake of increasing and speedy intra-Community trading implementation, causing pressure to apply a ready ‘administrative fix’ to newly arising infringements, surpassing civil law and self-regulatory alternatives, all in neglect of subsidiarity. A considerable amount of trust is placed in the good governance of the relevant networks.

The second cross-cutting, *multi-actor*, question is how the *Dutch Consumer Authority* may successfully coordinate its efforts in and between the European network and the national networks in which it is involved. Good governance may be the stepping-stone to achieve trust, but ministerial overregulation or a lack of transparency is the pitfall. If the basic rules for taking responsibility and the division of powers to take binding decisions remain unclear or offer too little room for the *Authority* to (reciprocally) involve itself, commitment within the networks may fall short of the promise of rapid, efficient and effective supervision and enforcement.

To keep the *Consumer Authority* initially under ‘ministerial wings’ is a good decision if the opportunity is seized to create ‘hard and fast rules’ for both vertical and horizontal coordination. Nevertheless, if the proper and intricate mix of reciprocity and transparency cannot be achieved, full *publicisation* of Dutch *collective* consumer protection law may well prove the better alternative – given the requirements set by the European Community.

All of the changes caused by the *Rcpc* will probably serve the intra-Community protection of consumer law. There should, however, be serious concern about the likelihood that these changes will indeed disrupt those national systems of consumer protection which, presently, offer protection through civil law and self-regulation. *All* the parties concerned, the Commission included, will have to show their willingness to invest in ‘working together’ on the basis of trust and transparency. Should this fail, regardless of the *Rcpc*’s intentions, a (protracted) transition, within these Member States, to a system of administrative law enforcement against collective infringements of consumer law and a withdrawal of civil society involvement can be expected